'Britain Alone' : A View from Northern Ireland

Britain Alone!

The Implications and Consequences of United Kingdom Exit from the EU

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CHAPTER 3

'Britain Alone': A View from Northern Ireland

Gordon Anthony[*]

§3.01 INTRODUCTION

Northern Ireland is often said to be different from the rest of the United Kingdom not just because of its geographical detachment from Britain ('alone'?), but also because of its historical and contemporary systems of devolved government.[1] In terms of possible UK withdrawal from the European Union, its contemporary system of government – which is premised upon a particular form of consociationalism[2] – presents something of a paradox. On the one hand, the fact that the devolved institutions in Northern Ireland have worked within policy areas that have been heavily conditioned by EU law might be expected to provide an opportunity for reinvigorated local decision-making in the event of EU withdrawal,[3] particularly as the UK moves towards a form of

* I wish to thank a number of friends and colleagues for their comments on earlier versions of this chapter: Pat Birkinshaw; Leanne Cochrane; Brice Dickson; John Morison; Thomas Muinzer; and Alex Schwartz. All opinions and errors are mine.

1. On the historical systems see B. Hadfield, *The Constitution of Northern Ireland* (SLS Legal Publications, Belfast, 1989) and J. Morison & S. Livingstone, *Reshaping Public Power: Northern Ireland and the British Constitutional Crisis* (Sweet and Maxwell 1995). For current structures *see* C Knox, *Devolution and Governance in Northern Ireland* (Manchester U. Press, 2010).
2. *See* J. McGarry & B. O'Leary, *Constitutional Theory, Northern Ireland's Conflict, and its Agreement. Part I: What Consociationalists Can Learn From Northern Ireland* 41 Govt. & Opposition 43 (2006).
3. For an insight into the extent of overlap between EU policy and NI competence *see*, *Report on Assembly Committee Priorities for European Scrutiny in 2014*, NIA 159/11-15, Committee of the Office of the First Minister and Deputy First Minister, available at http://www.niassembly.gov.uk/Assembly-Business/Committees/Office-of-the-First-Minister-and-deputy-First-Minister/Reports/.

'devo-max' in the light of the Scottish referendum of 18 September 2014.[4] However, even leaving aside the obvious question of how far Northern Ireland's interests would truly become distinct from those of the EU in the event of withdrawal, its governmental structures may well frustrate the potential within any new political settlement. This is because the devolved institutions function on the basis of compulsory power-sharing between the major political parties in the Northern Ireland Assembly and within constitutional rules that allow Northern Ireland's main ethno-national groups to block initiatives in the Assembly and in the Northern Ireland Executive Committee.[5] Such structures can inevitably have a limiting influence on the development of policy, and there have been a number of high-profile disputes in areas that have included planning law and, most recently, welfare reform.[6] EU withdrawal might therefore give rise to a notionally enhanced democratic context, but it may well prove to be one that is neither efficient nor effective.

The possibility of withdrawal also has implications for at least two other important aspects of governance in Northern Ireland. The first of these is, of course, relations between Northern Ireland and the Republic of Ireland, which are set within the broader framework of relations between the UK and Irish states. At the level of inter-state cooperation, UK withdrawal would have the immediate effect of placing a land border between Northern Ireland and an EU Member State, where some commentaries have already noted that problems may arise in relation to matters of policing and criminal justice.[7] However, it is at the level of North/South inter-governmental relations that the impact of withdrawal could be expected to be at its most pronounced. Those relations entered a new period of formalised cooperation after the Belfast (or Good Friday) Agreement of 1998, which provided for the creation of a North-South Ministerial Council and a range of 'implementation' bodies in areas of mutual interest.[8] Cooperation within that framework has since been largely positive,[9] although much of

4. *See*, at the time of writing, the report of the 'Smith Commission' on devolution in Scotland at https://www.smith-commission.scot/wp-content/uploads/2014/11/The_Smith_Commission_Report-1.pdf and the Scotland Bill 2015 at https://www.gov.uk/government/publications/scotland-bill-2015-legislation-and-explanatory-notes; the Wales Act 2014, available at http://www.legislation.gov.uk/ukpga/2014/29/contents/enacted; and the 'Stormont House Agreement' of 23 Dec. 2014, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/390672/Stormont_House_Agreement.pdf, as read with 'A Fresh Start – the Stormont Agreement and Implementation Plan', 2015, at https://www.gov.uk/government/news/a-fresh-start-for-northern-ireland.
5. Northern Ireland Act 1998, Part III, esp section 28B; and section 42. Some slight changes to the workings of the rules are, however, imminent: *see* the 'Stormont House Agreement', *supra* n. 4, paragraphs 57-58, as read with 'A Fresh Start', *supra* n. 4, Appendix F3.
6. *See*, as regards planning law, A. Schwartz, 'Petitions of Concern', Northern Ireland Assembly Knowledge Exchange Seminar Series, 20 Mar. 2014, at p. 4. On welfare *see* http://www.bbc.co.uk/news/uk-northern-ireland-32894371, as now read in the light of *A Fresh Start*, n 4 supra.
7. 'Leaving the EU', House of Commons Library, Research Paper 13/42, at pp 98–99 (available at http://www.parliament.uk/business/publications/research/briefing-papers/RP13-42/leaving-the-eu).
8. J. Coakley, *The Belfast Agreement and the Republic of Ireland* in *Aspects of the Belfast Agreement* Chapter 12 (R. Wilford ed., Oxford U. Press 2001).
9. But *see Re De Brun and McGuinness' Application* [2001] NI 442; and Northern Ireland Act 1998, section 52A, as inserted by the Northern Ireland (St Andrews Agreement) Act 2006, section 12.

it has occurred under the influence of EU law and, in some instances, with direct EU funding. Withdrawal might on that basis be expected to complicate North/South relations and to raise questions about how cross-border initiatives might find support from within Northern Ireland's consociational institutions.

The other aspect of governance concerns equality and human rights law, where the prospect of EU withdrawal must be assessed alongside related debates about the possible repeal of the Human Rights Act 1998 and the introduction of a British Bill of Rights. Although there is no necessary cause and effect between EU membership and the Human Rights Act 1998, Euro-scepticism in the UK has increasingly included criticisms of the European Court of Human Rights (ECtHR), and it led the Conservative Party to commit itself to repeal the Human Rights Act 1998 in the (subsequently realised) event that it won the 2015 general election.[10] For Northern Ireland, a 'withdrawal and repeal' package may well present very significant challenges, particularly given the role that equality and human rights law have played before, during, and after the Belfast Agreement of 1998. For instance, one immediate question would concern the future jurisprudential basis for some aspects of equality law in Northern Ireland, where EU legislation and decisions of the Court of Justice of the European Union (CJEU) have been central to some of the Northern Ireland case law. However, even more fundamental is the matter of how human rights (beyond those associated with non-discrimination) might be protected in the event of withdrawal and repeal. This is essentially a point about Part 6 of the Belfast Agreement, which envisaged that rights would receive enhanced protection in Northern Ireland and that related initiatives would be developed in the Republic of Ireland and on an all-Ireland basis.[11] While it might be doubted how far an integrated approach to the protection of rights has actually been achieved (or, indeed, is achievable),[12] the European Convention on Human Rights (ECHR) and the Charter of Fundamental Rights of the European Union (the EU Charter) are sources of law both in Northern Ireland and in the Republic of Ireland.[13] UK withdrawal would of course immediately change that position in respect of the EU Charter, while repeal of the Human Rights Act 1998 would mean that the very European rights standards that have (arguably) aided Northern Ireland's transition from conflict would no longer be directly enforceable in court.[14] Repeal of the Human Rights Act 1998 might also be expected to place the UK government in breach of its commitments under the Belfast Agreement, notably to:

> complete incorporation into Northern Ireland law of the European Convention on Human Rights, with direct access to the courts, and remedies for breach of the

10. http://www.bbc.co.uk/news/uk-politics-21726612: 'Theresa May: Tories to Consider Leaving the European Convention on Human Rights'; and T. Lock, 'Legal Implications of Human Rights Reform in the UK' UK Const L Blog (15 May 2015), available at http://ukconstitutionallaw.org.
11. *See* P. Mageean & M. O'Brien, *From the Margins to the Mainstream: Human Rights and the Good Friday Agreement* 22 Fordham Intl L. J. 1499 (1998).
12. For some issues see S. Egan & R. Murray, *A Charter of Rights for the Island of Ireland: An Unknown Quantity in the Good Friday/Belfast Agreement*, 56 Intl & Comp. L. Q. 797 (2007).
13. See, in the Republic of Ireland, the European Convention on Human Rights Act, 2003; and Art 29 of the Constitution of Ireland, 1937, and the European Communities Act, 1972.
14. On the role of European standards see, e.g., B. Dickson, *The European Convention on Human Rights and the Conflict in Northern Ireland* (Oxford University Press 2010).

> Convention, including power for the courts to overrule Assembly legislation on grounds of inconsistency.[15]

In developing these points, this chapter starts with a short section that addresses the question whether UK withdrawal would result in increased power in the context of devolution, and whether that would be beneficial for the Northern Ireland institutions. It thereafter divides into three sections on the 'problem' of consociationalism; North/South intergovernmental relations; and equality and rights. The section on equality and rights also touches upon broader issues of constitutional reform in the UK post- the Scottish referendum of 18 September 2014, and considers whether the devolved legislatures might themselves choose to give 'local' domestic effect to the ECHR. The conclusion offers some more general comments about Northern Ireland's place within the UK's contemporary constitutional structures.

§3.02 EU MEMBERSHIP AND NORTHERN IRELAND: BETTER IN, OR BETTER OUT?

The question whether EU membership is a positive or a negative in the context of devolution is one that has been touched upon in much of the extant literature on regionalism in the EU.[16] Although that literature does not provide an agreed answer to the question – preferences about membership and regionalism inevitably have a subjective element – it draws attention to a number of constitutional and political factors that determine how devolved power is to be accommodated within the EU's institutional framework. Perhaps the best known of these is the rule whereby the internal constitutional arrangements of a Member State are not to be affected by EU law, at least insofar as EU law neither requires the devolution of power nor prescribes minimum levels of power where devolution occurs.[17] In historical terms, this state-centric focus is consistent with the international law origins of the (now supranational) EU legal order, and it still takes form in, among other things, Article 258 TFEU. That Article famously provides the legal basis for the European Commission to initiate infraction proceedings against Member States, including in those circumstances where the infraction has been caused by the actions or inactions of a regional, or devolved, authority.[18] In such circumstances, the Member State government will be the named respondent in the proceedings and, should the infraction be proven, it is the Member State government that will potentially be subject to any fines that may be imposed under Article 260 TFEU. To guard against the financial imbalance that this might cause within the UK where, for instance, the Northern Ireland institutions breach EU law, the

15. Paragraph 2 of Part 6 of the Agreement.
16. See, e.g., A. Cygan, *Regional Governance, Subsidiarity and Accountability within the EU's Multi-level Polity*. 19 Eur. Pub. L. 161 (2013) and references therein.
17. See further G. Anthony & A. Evans, *Northern Ireland, Devolution, and the European Union*, in *Human Rights, Equality and Democratic Renewal in Northern Ireland* 53 (C Harvey ed., Hart Publishing 2001).
18. See, e.g., Case C-103/01, *Commission v. Germany* [2003] ECR I-5369.

'concordats of the constitution' provide that the Northern Ireland institutions will be responsible for the costs of proceedings.[19]

The concordats of the constitution also provide for devolved participation in EU decision-making, where there is some overlap with EU Treaty guarantees on subsidiarity and regional input into the EU process.[20] Of course, this is where the 'in/out' debate has most resonance for Northern Ireland, as a democratic critique of the EU that starts with a state perspective may become even more compelling when developed at the sub-state level. That said, such critiques often presuppose the validity of a state based model of democracy, and it has been said that that model does not offer a suitable means for assessing the legitimacy of the EU.[21] The point here is that the EU is now one actor among many in a much wider network of governance that engages institutions found at the state, sub-state, European and global levels.[22] While there is some disagreement about the constitutional theory that best explains the nature of that engagement,[23] most commentators would accept that there are inextricable links between the various sites of government and that devolved authorities should be engaged in policy formation as equal partners where their interests overlap with those of others.[24] On this reading, withdrawal from the EU would be folly because it would complicate the links that the UK would continue to have with other sites of authority and also deny the Northern Ireland and other devolved institutions the power to project their interests through, for instance, 'national' offices that are maintained in Brussels.[25]

The above analysis can, however, be criticised insofar as it presupposes that the interests of the UK, including those of Northern Ireland, can only be protected from within the EU rather than alongside it. This is certainly the essence of the political argument that has been made in favour of withdrawal, which appeals to the imagery of repatriating political power in a way that would allow the UK to take greater control of its relations with the EU and the world at large.[26] Whether this comports with current constitutional realities is the remaining doubt about such an argument, but, if it is true that power can be meaningfully repatriated, this could have far-reaching implications for the Northern Ireland institutions. As was mentioned above, the competence of those institutions is heavily conditioned by EU law and withdrawal may, in that sense,

19. 'Devolution: Memorandum of Understanding and Supplementary Agreements', B4.25, available at http://www.ofmdfmni.gov.uk/memorandum_of_understanding_and_concordate_on_co-ordination_of_eu_issues_-_march_2010.pdf. And see R. Rawlings, *Concordats of the Constitution*, 116 L. Q. Rev. 257 (2000).
20. Article 5 TEU; Prot 2 TEU; Articles 305–307 TFEU.
21. A. Moravcsik, *Is There a 'Democratic Deficit' in World Politics? A Framework for Analysis*, 39 Govt & Opposition 336 (2004).
22. N. Walker, *The Idea of Constitutional Pluralism* 65 Modern L. Rev. 317 (2002).
23. M. Loughlin, *Constitutional Pluralism: An Oxymoron?* 3 Global Constitutionalism 9 (2014).
24. G. Marks, L. Hooghe & K. Blank, *European Integration from the 1980s: State Centric v. Multi-Level Governance* 34 *Journal of Common Market Studies* 341. But compare G. della Cananea, 'Is European Constitutionalism Really Multilevel?' ZaöRV 70 (2010), 283–317, available at http://www.zaoerv.de/70_2010/70_2010_2_a_283_318.pdf.
25. For the office of the Northern Ireland Executive *see* http://www.ofmdfmni.gov.uk/index/promoting-ni/onieb.htm.
26. *See*, e.g., I Milne/The Bruges Group, *The Single Market and British Withdrawal*, 2011, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/278491/Bruges_Group_SingleMarketAndWithdrawal.pdf.

'free up' localised policy initiatives under the Northern Ireland Act 1998.[27] Indeed, while it is axiomatic that the terms of the Northern Ireland Act 1998 would need to be amended in the event of withdrawal, any new settlement would surely mean the devolution of more power, not less. This is particularly so given the political commitments that were made in the run-up to the Scottish independence referendum of 18 September 2014, which amounted to a virtual promise to implement 'devo-max'.[28] While it remains to be seen quite how that increase in devolved Scottish power will take form, centrifugal pressures within the UK constitution may well mean that Northern Ireland (and Wales) might acquire more power as part of a broader settlement driven by the Scottish experience.[29] On this alternative reading, EU withdrawal would dovetail with internal constitutional realignment to broaden significantly the competences of the Northern Ireland institutions.

§3.03 THE 'PROBLEM' OF CONSOCIATIONALISM

The corresponding 'problem' that is presented by Northern Ireland's consociational structures starts with their emphasis on preventing the abuse of political power in a society that is largely comprised of two ethno-national groupings. Northern Ireland's historical experience was one in which the majority British Unionist community enjoyed hegemony over the minority Irish Nationalist community at levels that included political representation, economic opportunity, and the workings of the criminal justice system.[30] The Belfast Agreement of 1998 then marked a fundamental move away from that position by emphasising the principle of political equality that now informs, among other things, the blocking mechanisms that are contained in the Northern Ireland Act 1998.[31] Those mechanisms are intended to ensure that one ethno-national grouping cannot force a measure upon the other grouping where that latter grouping's core interests would be affected by the measure. This inevitably begs the question of what constitutes an ethno-national interest, and Schwartz has suggested that they cluster around the three themes of culture, the legacy of the Northern Ireland conflict, and the core elements of the Belfast Agreement itself.[32] However, while the blocking mechanisms place strong controls at the heart of the Northern Ireland Act 1998 in respect of those interests, it is apparent that the mechanisms can also be used to limit socio-economic measures that may not easily (or at all) be linked to ethno-national concerns. Against that backdrop, more power for the Northern Ireland institutions may ultimately mean more vetoes.

27. *See supra* n. 3.
28. A. McHarg, 'The Vow: Vote No for More Devo' at http://ukconstitutionallaw.org/2014/09/17/aileen-mcharg-the-vow-vote-no-for-more-devo/.
29. For proposals for Scotland, Wales and Northern Ireland at the time of writing *see supra* n. 4.
30. Views on the extent of the hegemony vary. For a balanced account *see* M. Mulholland, *Northern Ireland: A Very Short Introduction* (OUP 2003).
31. Although compare the much earlier – and unsuccessful – 'Sunningdale Agreement': *see* B. Hadfield *supra* n. 1, at 110 ff.
32. *Supra* n. 6, at 3–4.

The principal blocking mechanism is the 'Petition of Concern' that is provided for by section 42 of the Northern Ireland Act 1998. According to that section, thirty members may petition the Assembly with their concerns about a measure that is to be voted on by the Assembly, with the result that the measure can be passed only with 'cross-community support'. 'Cross-community support' is here linked to designation rules that require members to register themselves as 'Unionist', 'Nationalist' or 'Other' when they are elected to the Assembly, and it essentially means that an impugned measure will be carried only where it attracts the support of a majority of both Nationalist and Unionist members.[33] While existing statistics on the mechanism do not suggest that it has been used to frustrate a majority of the Assembly's wider legislative programme, there is clear evidence that it has been used to block discrete initiatives that have affected ethno-national interests as well as some measures that have escaped ethno-national association. Reform of planning law, noted above, is one example of a measure that escaped such association; amendment of the law on abortion is another.[34]

Blocking mechanisms also exist in relation to exercises of Ministerial power, where departmental portfolios are for the most part allocated on the basis of party political strength in the Assembly and with reference to the so-called d'Hondt formula.[35] For instance, under section 28B of the Northern Ireland Act 1998, thirty members may again petition the Assembly to express a concern that a Ministerial decision would contravene the Ministerial Code of Conduct (which is statutory in form[36]) or that it relates to a matter of 'public importance'. Where such a petition is brought, the decision in question is to be referred to the Executive Committee for oversight, subject only to the Presiding Officer certifying, where appropriate and after having consulted the political parties, that there is a matter of 'public importance'.[37] Moreover, under the Ministerial Code of Conduct itself, powers of decision can be constrained in two further ways.[38] The first is through the requirement that Ministers bring to the attention of the Executive Committee decisions that, among other things, cross-cut departmental interests, require agreement on prioritisation, require the adoption of a common position, have implications for the Programme for Government,

33. Northern Ireland Act 1998, section 4(5)–5(A); and Order 3(7) of the Standing Orders of the Assembly. Section 4(5) defines 'cross-community support' as (a) the support of a majority of members voting, a majority of the designated Nationalists voting and a majority of the designated Unionists voting; or (b) the support of 60% of the members voting, 40% of the designated Nationalists voting and 40% of the designated Unionists voting'.
34. Schwartz, *supra* n. 6, at p. 4.
35. Northern Ireland Act 1998, section 18. But for the appointment of the First and Deputy First Ministers *see* section 16A; and for the position in relation to the Minister of Justice *see* section 21A(3A), as read with the Department of Justice Act (NI) 2010, section 2.
36. Northern Ireland Act 1998, section 28A and, e.g., *Re Solinas' Application* [2009] NIQB 43.
37. There are other procedural safeguards too: references must be made within seven days of the decision being taken or, where appropriate, notified to the Assembly; and a decision may be referred to the Executive Committee only once.
38. The text of the Code is available at http://www.northernireland.gov.uk/index/your-executive/ministerial-code.htm.

or are significant or controversial.[39] The second way is through section 28A(8)(c) of the Northern Ireland Act 1998, which requires that the Code provide:

> if any three members of the Executive Committee require the vote on a particular matter which is to be voted on by the Executive Committee to require cross-community support, any vote on that matter in the Executive Committee shall require cross-community support in the Executive Committee.[40]

It is important not to overstate the significance of such mechanisms, as government in Northern Ireland has functioned almost without interruption since 2007 and statistics on legislative productivity have been said to compare favourably to those in Scotland.[41] Nevertheless, it is also true that the blocking mechanisms can be used to considerable effect and that, where there is a more general lack of political trust between the various parties, government can enter a period of stasis. This was certainly the case during the later months of 2014 when political disputes about issues ranging from welfare reform through to the problem of dealing with Northern Ireland's violent past threatened to cancel one another out and create very real resource pressures within the Northern Ireland departments. While the disputes were apparently resolved by political agreements that were reached in December 2014 and November 2015 – these envisage use of the petition of concern mechanism only in exceptional circumstances and where there is a statement to explain why it is being used – they still reveal how the blocking mechanisms can almost undermine the very democratic purposes of the Northern Ireland institutions themselves.[42] If EU withdrawal were to entail additional competence, the promised reform of the petition of concern mechanism may therefore become a matter of very real practical need.

§3.04 NORTH/SOUTH INTERGOVERNMENTAL RELATIONS

The North/South inter-governmental relations that were noted in the introduction centre upon the North-South Ministerial Council (NSMC) and six 'implementation bodies' that work in areas of 'mutual interest': Waterways Ireland; the Food Safety Promotion Board; the Trade and Business Development Body; the Special European Union Programmes Body; the Language Body; and the Foyle, Carlingford and Irish Lights Commission. In formal terms, the NSMC and implementation bodies are creatures of international law, as they have their origins in the UK and Irish governments' commitments under the Belfast Agreement 1998 and British Irish Agreement

39. *See* paragraph 2.4 of the Code and, e.g., *Re Central Craigavon Ltd's Application* [2011] NICA 17, paragraphs 16–19.
40. In addition, see paragraph 2.12 of the Code.
41. Schwartz, *supra* n. 6 at p. 4. For details about a short period of interruption see http://www.bbc.co.uk/news/uk-northern-ireland-34426811.
42. See the 'Stormont House Agreement' 2014 and 'A Fresh Start', at *supra* n. 4. The Stormont House Agreement's provisions on the petition of concern are at paragraphs 57–58; the relevant part of 'A Fresh Start' is Appendix F3.

1999, as subsequently implemented in domestic law.[43] However, in political terms, the NSMC and implementation bodies are best understood with reference to an Irish Nationalist view of the Belfast Agreement insofar as they embody an all-Ireland dimension to the governance of Northern Ireland (an East-West dimension, preferred by Unionists, is provided for by the British-Irish Council[44]). While the NSMC does not have executive power, it has assumed a prominent political role that is at its most evident when the First Minister and Deputy First Minister and the Taoiseach convene 'plenary' meetings.[45] Otherwise, the great majority of the meetings are 'sectoral' and held to consider the work of the implementation bodies and to discuss, though not to decide, matters of policy in areas that include agriculture, education, the environment, and tourism.[46] Such sectoral meetings are (typically) to be attended by the Northern Ireland Minister and Junior Minister with responsibility for the sector in question – Ministers who will often reflect the ethno-national balance in the Assembly – and they are under a statutory duty to participate in the work of the meeting insofar as relates to their area of responsibility.[47] Where the agenda for a meeting contains an item that is 'significant or controversial', it may also be attended by the First Minister and Deputy First Minister even if the item in question does not fall within the responsibility of their office.[48]

It is not difficult to envisage how UK withdrawal would complicate the work of the NSMC and the implementation bodies. At a minimum, it would have implications for cooperation in EU influenced policy areas such as agriculture and the environment, as the Republic of Ireland would remain tied to EU policies and Northern Ireland would not. While the extent of any differences between the two jurisdictions would, again, depend upon the precise terms of UK withdrawal, the dynamics of cooperation would inevitably change precisely because there would no longer be any mutual bind to EU law. Indeed, those changed dynamics may become all the more remarkable if it were to be perceived that post-withdrawal cooperation within the framework of the NSMC was being used to foster policies that aligned Northern Ireland more closely to Irish interests rather than those in the rest of the United Kingdom. This is essentially a political point about the reservations that Unionists may have about increased cooperation on an all-Ireland basis, where recourse could again be had to the blocking mechanisms in the Northern Ireland Act 1998. In that instance, there may well be a debate about whether use of the ethno-national veto would be undermining the spirit of the Belfast Agreement or safeguarding one set of the ethno-national interests that are at the Agreement's very heart.

43. *See*, in the UK, Northern Ireland Act 1998, sections 52A–55, and the North/South Co-operation (Implementation Bodies) (NI) Order, 1999, SI 1998/859; and *see*, in the Republic of Ireland, the British-Irish Agreement Act, 1999.
44. Belfast Agreement, Part 5; and Northern Ireland Act 1998, section 52A. *See* V. Bogdanor, *The British-Irish Council and Devolution* 34 Govt. & Opposition 287 (1999).
45. On the various formats for meetings *see* D. Birrell, *Intergovernmental Relations and Political Parties in Northern Ireland* 14 Brit. J. Pol. & Intl Rel. 270, 277–278 (2012).
46. Belfast Agreement, Part 4.
47. Northern Ireland Act 1998, sections 52A–52B. *See also* Part 3 of the Ministerial Code of Conduct, available at http://www.northernireland.gov.uk/index/your-executive/ministerial-code.htm.
48. Northern Ireland Act 1998, section 52(A)(8), as read with section 20(3)-(4).

Withdrawal would also have financial implications because it would, among other things, end EU funding for the Special European Union Programmes Body. That body has supported a large number of initiatives including those concerned with cross-community reconciliation, and replacement funding would be needed if such initiatives were to receive post-withdrawal support. That said, there would be the potential for blocking mechanisms to be used here too if, for instance, a Northern Ireland Ministerial decision to grant funding for a project were to attract controversy. The point can be seen in relation to the earlier case of *Re Solinas' Application,*[49] which involved a challenge to a Ministerial decision to withdraw government funding from a community project in a Loyalist area of Belfast. The decision was taken because the Minister – a member of the (Nationalist) Social Democratic and Labour Party – was of the view that there was on-going paramilitary activity in the community and that that activity was in breach of the conditions under which the money had been granted. However, on an application for judicial review, the court found that the Minister had acted unlawfully in making her decision as she had failed to adhere to a number of procedural requirements that had earlier been laid down by the Executive Committee. The court thus held that the Minister had breached the Ministerial Code and quashed her decision.

§3.05 EQUALITY AND HUMAN RIGHTS LAW

The remaining matter to be addressed is that concerned with equality and human rights law. As indicated in the introduction, these are areas of law that have played an important role in reshaping Northern Ireland society, where their influence can be traced to before the signing of the Belfast Agreement of 1998.[50] In terms of equality law, the historical imperative has very much been the need to address the socio-economic imbalances that were associated with Unionist hegemony, and section 75 of the Northern Ireland Act 1998 addresses religious and political discrimination as well as that associated with race, marital status, sexual orientation, gender, disability, and the status of those with and without dependants.[51] Section 75 is not, however, a stand-alone provision in the context of addressing discrimination, as religious and political discrimination is also governed by the Fair Employment and Treatment (Northern Ireland) Order 1998 (which replaced the Fair Employment [Northern Ireland] Act 1989), while the other categories noted in section 75 overlap with a range of EU Treaty

49. [2009] NIQB 43.
50. On equality law *see* C. McCrudden, *Equality*, in *Human Rights, Equality, and Democratic Renewal in Northern Ireland* 75 (C. Harvey eds, Hart Publishing 2001); and on human rights *see* Mageean and O'Brien, *supra* n. 11.
51. Section 75(1) reads: "A public authority shall in carrying out its functions relating to Northern Ireland have due regard to the need to promote equality of opportunity – (a) between persons of different religious belief, political opinion, racial group, age, marital status or sexual orientation; (b) between men and women generally; (c) between persons with a disability and persons without; and (d) between persons with dependants and persons without".

Articles and Directives that have been implemented in domestic law.[52] That having been said, there are some important points of difference between the various statutory provisions, notably in relation to their reaches and effects. For instance, section 75, which is to be read with Schedule 9 to the Northern Ireland 1998, applies only to public bodies within the terms of the Act and is subject to an enforcement regime that centres upon the powers of the Equality Commission for Northern Ireland rather than judicial remedies[53] (albeit that judicial review can play a residual role in some cases; damages are also available where a public authority discriminates or aids or incites another person to discriminate on the ground of religious belief or political opinion).[54] This 'vertical' approach can then be contrasted with that which applies in relation to the Fair Employment and Treatment (Northern Ireland) Order 1998, which has 'vertical' and 'horizontal' dimensions and which fastens upon judicial remedies.[55] The range of related measures that have their origins in EU law likewise enjoy vertical and horizontal effect, where access to judicial remedies is underpinned by EU law's principle of the effective protection of EU law rights.[56]

The starting point in terms of human rights law is the Belfast Agreement's emphasis on the need to safeguard rights at all levels of government in Northern Ireland and in society more generally.[57] That objective was subsequently given legislative form both in the Human Rights Act 1998 – the passage of which coincided with the Belfast Agreement – and the Northern Ireland Act 1998. Of course, section 6 the Human Rights Act 1998 famously makes it unlawful for public authorities to act in a manner that is incompatible with the provisions of the ECHR that have effect under Schedule 1 to the Act, where public authorities are read as including the Northern Ireland Assembly and Northern Ireland government departments.[58] However, it is the Northern Ireland Act 1998 that reflects more fully the requirements of the Belfast Agreement, as it embeds additional constraints on legislative and executive power at the devolved level. While it is true that the Act includes an interpretive obligation whereby the courts must try to read Acts of the Assembly as within its competence[59] – challenges to Ministerial decisions may also attract judicial restraint where that is deemed appropriate[60] – it is a commonplace that exercises of power may be constrained on the basis of European human rights norms. The legislative competence of

52. For example, the Employment Equality (Sexual Orientation) Regulations (Northern Ireland) 2003, SR 2003/497, as read with Directive 2000/78/EC. *See* further chapters 12-18 of *Human Rights in Northern Ireland: The CAJ Handbook* (B Dickson and B Gormally ed, Hart Publishing, 2015).
53. *Re Neill's Application* [2006] NICA 5, [2006] NI 278.
54. On judicial review *see Re JR1's Application* [2011] NIQB 5; and on damages *see* Northern Ireland Act 1998, section 76.
55. *Re Kirkpatrick's Application* [2004] NIJB 15.
56. *See*, most famously, Case 222/84, *Johnston v. Chief Constable of the RUC* [1986] 3 CMLR 240.
57. Part 6, available at https://www.gov.uk/government/publications/the-belfast-agreement.
58. Sections 6 & 21.
59. Northern Ireland Act 1998, section 83, as read in the light of *Att-Gen v. National Assembly for Wales Commission* [2012] UKSC 53, [2012] 3 WLR 1294; *Imperial Tobacco Ltd v. Lord Advocate* [2012] UKSC 61, [2013] SLT 2; and *Re Agricultural Sector (Wales) Bill* [2014] UKSC 43, [2014] 1 WLR 2622.
60. *Department for Social Development v. MacGeagh* [2006] NI 125, 136-8.

the Northern Ireland Assembly is thus limited with reference to the ECHR/Schedule 1 to the Human Rights Act 1998 and by EU law (which includes the EU Charter);[61] while exercises of executive power are subject to related ECHR and EU law limitations.[62]

How, then, would a 'withdrawal and repeal' package of the kind that was noted in the introduction affect Northern Ireland? Taking first the field of equality law, it could be expected that any impact would be mixed, as various aspects of equality law, most notably section 75 of the Northern Ireland Act 1998 and the Fair Employment and Treatment (Northern Ireland) Order 1998, would remain in force. Moreover, to the extent that elements of the wider body of anti-discrimination law are sourced in EU law, there is no reason in principle why the relevant domestic law measures could not be kept in force and given a 'domestic' interpretation as cases arise in the future. This is certainly the logic that underpins 'transitional' or 'savings' provisions in legislation and, while repeal of the European Communities Act 1972 would obviously present challenges on a larger scale, any Act that effects its repeal could easily include Schedules of 'saved' secondary legislation. That said, there would inevitably also be an element of fiction to any such arrangement, as the legislation that would be saved would have been moulded by the case law of the CJEU, which would continue to give (what would be) non-binding rulings about the EU measures that first underpinned the 'domestic' legislation. This would thus mean that the Northern Ireland courts would be faced with the option of either ignoring the relevant rulings of the CJEU – which may often include consideration of the Equality Chapter of the EU Charter – or affording them the value of persuasive precedents. In the event that they (even occasionally) adopt the latter approach, this would strengthen the well-established argument that legal systems cannot fully close themselves off from one another in the modern global polity and that they should not seek to do so.[63]

The repeal of the Human Rights Act 1998 would of course end any direct role for Article 14 ECHR in domestic proceedings, as well as for all of the Articles within whose ambit Article 14 ECHR must fall in order to be actionable. In a UK-wide sense, this is a prospect that should perhaps now be viewed against the backdrop of an increased judicial emphasis on the role that the common law can play in protecting rights, where the clear implication is that repeal may not lead to reduced levels of rights protection but rather to a different means of achieving protection (there is also the fact that the Human Rights Act 1998 may be replaced by a British Bill of Rights).[64] However, in the specific context of Northern Ireland, repeal may carry with it a very different consequence given the UK government's commitments under the Belfast Agreement 1998. As was noted in the introduction, Part 6 of the Belfast Agreement requires the UK government to incorporate the ECHR into Northern Ireland law and to provide for a system of judicial remedies that includes the power to strike-down Assembly legislation. UK-wide repeal of the Human Rights Act 1998 without more would therefore not

61. Northern Ireland Act 1998, sections 6, 79–81, 83, 98.
62. Northern Ireland Act 1998, sections 24, 98.
63. M. Hunt, *Using Human Rights Law in English Courts* Chapters 1–3 (Hart Publishing 1997).
64. On the common law *see*, e.g., *R (Osborn) v. Parole Board* [2013] UKSC 61, [2014] AC 1115; and Birkinshaw, Chapter one, this volume.

only place the UK government in apparent breach of its commitments under the Belfast Agreement but would also have a complicating effect on the scheme of guarantees that are presently contained in the Northern Ireland Act 1998. In a practical sense – and perhaps the most worrying sense of all – it would further mean that individuals would no longer be able to rely upon European human rights standards in litigation arising from state (in)action during the Northern Ireland conflict,[65] albeit that there would remain the option of petitioning the Strasbourg Court itself.[66]

It might be thought that there would be some way around such difficulties in relation to human rights protection. For instance, on the assumption that the UK government would remain as a contracting party to the ECHR notwithstanding the repeal of the Human Rights Act 1998, its international law obligations might still be given specific territorial effect in Northern Ireland (something that might also discharge a narrow reading of the UK government's obligations under the Belfast Agreement). However, a matter of very real importance to any such territorially limited scheme would be the meaning that would be given to 'public authority' within what would become the statutory equivalent of section 6 of the Human Rights Act 1998. While almost all human rights cases in Northern Ireland would still be concerned with the actions and inactions of public authorities that are seated in Northern Ireland (the Police Service of Northern Ireland, local councils, etc), issues may also arise in relation to decisions taken by central UK government departments. The most obvious area in which this might cause concern is the investigation of conflict-related deaths that involved members of the British Army, as the Ministry of Defence would be a party to any potential proceedings. While it is presently accepted that Article 2 ECHR applies to such cases even though the facts at issue pre-date the coming into force of the Human Rights Act 1998,[67] a statutory scheme that did not apply to central government departments would end that possibility and may greatly complicate efforts to deal with Northern Ireland's past.[68] Indeed, it is not hard to envisage that cases that may have involved the police and the Army working in concert may result in only greater uncertainty about what the state may have done: while the actions of the police would be governed by the exacting standards of Article 2 ECHR, those of the Army would not.

The other possibility would be for the Northern Ireland Assembly itself to seek to enact legislation to give effect to the ECHR. This is certainly something that the Assembly might come to consider in tandem with the other devolved legislatures, as the expected increase in devolved powers post-September 2014 may lead the Scottish and Welsh legislatures to re-evaluate core civic values, including openness to European influences. For instance, one model that might be adopted is that which has already been used by the National Assembly for Wales in relation to the UN Convention on the Rights of the Child, where the Rights of Children and Young Persons (Wales) Measure

65. As in, e.g., *Re Finucane's Application* [2013] NIQB 45.
66. For a recent conflict related application *see McCaughey v. UK* (2014) 58 EHRR 13.
67. *Re McCaughey and Quinn* [2011] UKSC 20, [2011] 2 WLR 1279. But compare *R (Keyu) v. Secretary of State for Foreign and Commonwealth Affairs* [2014] EWCA Civ 312, [2015] QB 57, on appeal to the UKSC at the time of writing.
68. On which efforts *see* G. Anthony & L. Moffett, 'Law, Politics, and the "Problem of the Past"' (2014) 20 *EPL* 395.

2011 imposes a duty on Welsh Ministers to have 'due regard' to the UN Convention when exercising their functions.[69] However, even leaving aside the question of how far such duties would be meaningfully enforceable in practice – it may be that Ministerial decisions would be open to challenge only on grounds of failure to take relevant considerations into account and/or *Wednesbury* unreasonableness[70] – the constitutional setting in Northern Ireland may ultimately frustrate attempts to give local legislative effect to the ECHR. The point here is not just that consociationalism may again problematise the passage of any Assembly Bill – the Unionist ethno-national bloc tends to be less inclined towards the mobilisation of human rights arguments than the nationalist bloc, at least where those arguments relate to Northern Ireland's past[71] – but also that any clauses touching upon national security/anti-terrorism measures would fall out-with the competence of the Assembly.[72] In that scenario, it may well be that the UK government's failure to fulfil its obligations under the Belfast Agreement 1998 would be made only even more apparent by the Northern Ireland Assembly's inability to impose those obligations by proxy.

§3.06 CONCLUSION

This chapter began by observing that UK withdrawal from the EU might present something of a paradox in the context of Northern Ireland. Certainly, the idea that withdrawal might free up localised policy initiatives has been seen to be complicated by a form of consociationalism that can frustrate responsive government as much as it can facilitate it. In constitutional terms, this is perhaps an unavoidable consequence of Northern Ireland's history, where any increase in devolved power post-withdrawal would have to be reconciled with the need to constrain competing ethno-national preferences. Indeed, while it has been seen that the consociational system is (arguably) open to abuse under the Northern Ireland Act 1998, it remains as one of the most rudimentary features of the Belfast Agreement and is, in that sense, something of a constitutional fundamental.[73] Any increase in power – whether prompted by EU withdrawal and/or a move towards 'devo-max' – would therefore have to face the reality that democracy in Northern Ireland can sometimes be about nothing more constructive than stopping things from being done.

Of course, such comments assume that EU withdrawal would result in a meaningful repatriation of power at the UK level and that any internal reconfiguration of the domestic constitution would have a centrifugal dynamic. While a centrifugal dynamic would seem to be guaranteed given the experience of the Scottish referendum

69. Section 1.
70. On *Wednesbury* in the context of other due regard duties *see*, e.g., *Re JR1's Application* [2011] NIQB 5 (Chief Constable of the PSNI's approach to his due regard duties under section 75 of the Northern Ireland Act 1998 not unreasonable).
71. *See generally* C. Lawther, *Truth, Denial and Transition: Northern Ireland the Contested Past* (Routledge 2014).
72. Northern Ireland Act 1998, Schedule 2, paragraph 17.
73. On the constitutional link between the Belfast Agreement and the Northern Ireland Act 1998 *see Robinson v. Secretary of State for Northern Ireland* [2002] UKHL 32, [2002] NI 390.

(and irrespective of EU withdrawal), the repatriation argument is one that is much less convincing. As was noted in the earlier part of this chapter, it is almost axiomatic that there are irreversible linkages between the various sites of government in contemporary society and that states cannot realistically close themselves off as sovereign legal orders.[74] This raises the very real possibility that EU withdrawal would ultimately become nothing other than the pursuit of a false sovereignty, and, for Northern Ireland, the most worrying implication would be at the level of equality and human rights. Such norms have long helped to define much of Northern Ireland's transition from a difficult and violent past, and they have become established as (admittedly contested) markers of civil and societal values. Should they become diminished as part of some more general UK retreat from Europe, it is not only Britain that would be 'alone' but the very idea that common values can work to the benefit of all of society.

74. *See generally* R. Rawlings, P. Leyland & A. Young (eds), *Sovereignty and the Law: Domestic, European and International Perspectives* (Oxford U. Press 2013).